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INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA, *et al.*,

Petitioners,

v.

JOHNSON CONTROLS, INC.,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

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BRIEF AMICI CURIAE OF EQUAL RIGHTS ADVOCATES, THE NOW LEGAL DEFENSE AND EDUCATION FUND, NATIONAL WOMEN'S LAW CENTER, AND WOMEN'S LEGAL DEFENSE FUND IN SUPPORT OF PETITIONERS

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BRIEF FOR EQUAL RIGHTS ADVOCATES, *ET AL.*, AS AMICI CURIAE

This brief amici curiae is filed with the consent of the parties as provided for in this Court's Rules.

INTEREST OF AMICI CURIAE AND PARTY SUPPORTED

The statement of the Interest of Amici is included in the Appendix. This brief supports the UAW, *et al.*, Petitioners.

SUMMARY OF ARGUMENT

The Seventh Circuit erred in omitting any discussion of the legislative history of the Pregnancy Discrimination Act (PDA), which makes clear that the PDA was intended to prohibit the Johnson Controls' policy of excluding all fertile women from employment based on their pregnancy or potential pregnancy.

In enacting the PDA, Congress was fully informed that its language would prohibit a policy of "refusing certain work to a pregnant employee where such work posed a threat to the health of either the mother-to-be or her unborn child," and enacted the PDA without change and with full understanding of its reach. The Chamber of Commerce informed both the House and Senate that the second clause of the PDA, requiring that "women affected by pregnancy, childbirth, or related medical conditions shall be treated the same for all employment-related purposes . . . as other persons not so affected but similar in their ability or inability to work," would prohibit such policies. Senator Hatch explored the topic with Dr. Andre Hellegers, who urged that "if we are talking about untoward effects of industrial processes on human procreation, we have to look at the effects on testicles, the effects on ovaries and the effects on fetuses, all three" in order to protect the children of both male and female workers. Dr. Hellegers also discussed the harm that could flow from denying

income to pregnant workers; he documented an increase in premature births, with accompanying risks of mental retardation and learning disabilities, that was associated with a decrease in the pregnant worker's income. Dr. Hellegers' views prevailed, for while Senator Hatch was the leading proponent of narrowing amendments to the PDA, he did not attempt to accommodate the Chamber of Commerce's "fetal protection" concerns.

In defining the term "sex" as it appears in Title VII to include "pregnancy, childbirth, or related medical conditions," Congress chose the broadest possible definition of pregnancy-related discrimination. Since the ability to become pregnant and bear children is a "medical condition" which is "related" to pregnancy and childbirth, the PDA explicitly prohibits the Johnson Controls' ban on all women who are either pregnant or who might become pregnant. The legislative history of the PDA, including the witnesses who testified, the Committee Reports, and the floor debate, overwhelmingly confirm that view. They all documented the source of pregnancy discrimination as including employers' attitudes about women's *capacity* for childbearing and their *potential pregnancies*, which led to discrimination against both pregnant women and women who might become pregnant. They made clear that refusing to hire women for such reasons would be illegal. Thus, in refusing to employ any woman who is pregnant or who might become pregnant, Johnson Controls engaged in a *per se* violation of Section 703(a) of Title VII, as amended by the PDA definition, which the Seventh Circuit erred in refusing even to discuss or acknowledge.

The Seventh Circuit also erred in ruling that fetal health concerns can be taken into account in deciding whether Johnson Controls established a Section 703(e) bona fide occupational qualification (BFOQ) defense to its facial violation of Title VII. The second clause of the PDA applies equally to the Section 703(e) defense, and requires that the BFOQ decision be grounded solely in the job performance criterion of an employee's "ability

or inability to work," as the Chamber of Commerce understood. The testimony, Committee Reports, and floor debate all make clear that Congress intended that under the PDA, in Representative Hawkins' words, "if an employer permits other employees to continue working unless their doctors regard them as physically unable to work, it may not force pregnant women off the job, as many employers have done in the past, while they are perfectly able to perform their jobs." As a matter of law, therefore, under the PDA there can be no BFOQ defense based on fetal heath concerns. Instead, the sole criterion for establishing a BFOQ is the employee's job performance abilities.

Title VII, as amended by the PDA, requires that employers adopt sex-neutral policies applying equally to both male and female workers; such policies will enable the employer genuinely concerned with fetal health to make the workplace safe for the children of both male and female employees. Such policies will also avoid the scientific irrationality of ignoring the effects of male workers' exposure to lead. The Occupational Safety and Health Administration has found "conclusive evidence of miscarriage and stillbirth in women . . . whose husbands were exposed" to lead. These problems can arise through the effect of lead on sperm and through male workers failing to exercise proper hygiene, thus carrying home lead on their bodies and clothes and affecting the fetus of their wives through intimate contact. Stereotypes make it easy for employers to ignore the role of men in the area of fetal health and to ignore the role of women in assuring adequate family income. These were precisely the kinds of stereotypes that the Pregnancy Discrimination Act was designed to eradicate from the workplace.

ARGUMENT

:TING THE PREGNANCY DISCRIMINA-T, CONGRESS INTENDED TO MAKE A OF EXCLUDING ALL FERTILE WOMEN MPLOYMENT BASED ON THEIR PREGNANCY OR POTENTIAL PREGNANCY A FACIAL VIOLATION OF SECTION 703(a) OF TITLE VII.

The Seventh Circuit's decision upholding the Johnson Controls' policy of refusing employment to all pregnant women and all women capable of becoming pregnant scarcely mentioned the Pregnancy Discrimination Act of 1978.[1] Even more conspicuously absent from the Seventh Circuit's decision is any analysis of the legislative history of the PDA. That legislative history reveals, however, as we show below, that Congress intended to prohibit precisely the employer ban on fertile women workers that the lower court upheld.

A. Congress Explicitly Considered the PDA's Impact on the Johnson Controls-Type Policy, Understood That the PDA's Language Prohibited Such Policies, and Enacted the PDA Without Change and With Full Understanding of Its Reach.

On the very first day of testimony (April 6, 1977) on the proposed PDA, the first opponent of the legislation to speak highlighted as his first reason for opposing the bill its effect on "Occupational Health." In both his oral and written statements, the Chamber of Commerce representative explained to Chairman Hawkins and the other Members of the House Subcommittee on Employment Opportunities:

> [The bill] requires that "women affected by pregnancy, childbirth or related medical conditions shall be treated the same for all employment related purposes." This would prevent an employer from refusing certain work to a pregnant employee where such

[1] Pub. L. No. 95-555, 92 Stat. 2076 (1978) (codified in part at 42 U.S.C. § 2000e(k) (1982)) [hereinafter cited as the PDA].

> work posed a threat to the health of either the mother-to-be or her unborn child.
>
> Even though the prospective mother might arguably be considered to have assumed the risk by asking to work in such circumstances, injury to the fetus might give the child a cause of action against the employer who, under the bill, would be powerless to deny the work to the child's mother during the pregnancy.

Legislation to Prohibit Sex Discrimination on the Basis of Pregnancy: Hearings on H.R. 5055 and H.R. 6075 Before the Subcomm. on Employment Opportunities of the House Comm. on Education and Labor, Part 1, 95th Cong., 1st Sess. 84, 88 (1977) [hereinafter cited as *House Hearings*] (statement and testimony of C. Brockwell Heylin, labor relations attorney, Chamber of Commerce of the U.S.). The Chamber submitted a virtually identical statement to the Senate Subcommittee on Labor the next month. *Discrimination on the Basis of Pregnancy, 1977: Hearings on S. 995 Before the Subcomm. on Labor of the Senate Comm. on Human Resources*, 95th Cong., 1st Sess. 482 (1977) [hereinafter cited as *Senate Hearings*] (statement of C. Brockwell Heylin). Thus, from the opening days of the Congressional hearings, Congress was on notice that the largest U.S. association of business and professional organizations, *id.*, believed that the second clause of the PDA[2] prohibited a policy virtually identical to the Johnson Controls' policy, and that the Chamber opposed the bill for that reason.

Senator Hatch, who later became the leading (though unsuccessful) proponent of amendments to narrow the scope and coverage of the PDA, quickly pursued the Chamber's points. On the very first day of the Senate hearings (April 26, 1977), Senator Hatch explored them

[2] The second clause provides that "women affected by pregnancy, childbirth, or related medical conditions shall be treated the same for all employment-related purposes, including receipt of benefits under fringe benefit programs, as other persons not so affected but similar in their ability or inability to work. . . ." 42 U.S.C. § 2000e (k) (1982).

with Dr. Andre Hellegers, a Professor of Obstetrics and Gynecology and Director of the Joseph and Rose Kennedy Institute for the Study of Human Reproduction and Bioethics at Georgetown University. Senator Hatch's questions were based on the Chamber's points about the PDA's second clause and occupational health:

> Senator Hatch: *What problems, if any, do you foresee in treating pregnant women the same as other employees* who have disabilities that continue to work?
>
> Dr. Hellegers: I can see none. I don't see any. I think it is just a question of having a physical exam.
>
> Senator Hatch: Do you think there would arise a whole slew of OSHA problems, occupational safety and health problems as a result of pregnant women?
>
> Dr. Hellegers: Let me put it this way: I have long been an advocate for a massive increase in research to deal with the effects of poisons, chemicals, physical or other agents on pregnant working women. However, two other things: Those agents are just as likely to affect the ovaries of nonpregnant women and there are in fact today companies that will not hire women on that specific basis.
>
> But *you never dream of thinking that the same agents may also affect the testicles of men. So if we are talking about untoward effects of industrial processes on human procreation, we have to look at the effects on testicles, the effects on ovaries and the effects on fetuses, all three*, and we aren't doing much of that.

Senate Hearings at 67 (emphasis added).

With this vivid and cogent remark, Dr. Hellegers struck at the heart of the stereotype underlying the Johnson Controls-type policy: that *male* participation in the reproductive cycle is irrelevant to fetal harm and may therefore be disregarded.[3] What Dr. Hellegers recommended instead was to examine fetal harm caused by *both* male and female worker exposure to chemicals and other agents, so that the children of both men and women employees could be protected.

[3] See Section III *infra* for a discussion of the scientific data showing that the sperm of male workers can be affected by their exposure to lead, thus leading to fetal harm, and for a discussion of how male workers who fail to take the appropriate hygiene measures after exposure to lead on the job can bring home lead on their bodies and clothes and affect the developing fetus of their wives through intimate contact. The Johnson Controls-type stereotype undoubtedly arises because of the centrality and strength of the mother-infant relationship in our culture, leading employers simply to forget about fathers. This is especially so during pregnancy, when the fetus is enclosed in the woman's body, and the father's connection to the fetus has no such visible and obvious manifestation.

The tendency to ignore the father's role in causing fetal harm was noted by the California Court of Appeal in discussing one of Johnson Controls' expert witnesses: "Dr. Noren cavalierly characterized the situation this way: 'If you don't look for a problem, you don't find it.'" *Johnson Controls, Inc. v. California Fair Empl. and Hous. Comm.*, 218 Cal. App. 3d 517, ——; 267 Cal. Rptr. 158, 168 (1990), *petition for rev. denied*, No. S014910 (Cal. May 17, 1990) (LEXIS, States library, Cal. file). Dr. Noren took this position to explain his belief that there was a lack of recent studies on the "effect of lead in male workers' reproduction systems," despite his recognition that "old studies did link lead exposure in male lead workers with *a high death rate among offspring in the first years of life*." *Id.* (emphasis added).

Shortly before this exchange, Dr. Hellegers' testimony dealt with another stereotype underlying the Johnson Controls-type policy: that the denial of jobs to pregnant women will not harm developing fetuses. The mother's *income* is important to fetal well-being, he explained:

> I am secondly in favor of this bill on the grounds of social good, and I have attached to my testimony a table on a study that we did in the Kennedy Institute which relates income to infant outcome. It is extremely clear that as income increases prematurity decreases, in some instances by almost 50 percent.
>
> What this means, in other words, is that the penalty of this kind of policy [loss of income during pregnancy] is paid not just by the woman, it is paid by the unborn child. One lawyer, incidentally, in one

case afterwards said the women can always get aborted. I happen to be opposed to abortion. All I can say is that this is a policy which harms not only women but harms the unborn, either whether you abort or you do not abort, and markedly increases the incidence of prematurity.

That goes to the issue of cost because what it really comes down to is that you pay a penalty either before birth by keeping income up at that time, or you pay a penalty after birth in terms of facilities for the mentally retarded, learning disabilities on which millions and millions are spent in this country.

Senate Hearings at 64. His written statement amplified on these concerns:

> The National Institute for Child Health and Human Development has estimated that prematurity costs the nation $1 billion per year. A task force report to Secretary of H.E.W. Califano puts a price tag of $130 million on each percentage point of prematurity in the nation. Those costs refer to the cost of care in hospital nurseries only. *They do not reflect the well known relationship between premature births and subsequent central nervous system disabilities, such as mental retardation and learning defects.* Its cost is immense. . . .
>
> . . . On a national scale one does well to remember that today *40% of all pregnant women work* and large numbers of them are heads of households or have unemployed husbands so *their loss of income affects* their own health and *their unborn children's*, at great cost to the nation. . . .

Senate Hearings at 75-76 (emphasis added). Dr. Hellegers made the identical point in the hearings before the House Employment Opportunities Subcommittee. *House Hearings* at 54, 58-59.[4]

[4] The American Nurses' Association also documented the connection between loss of income and fetal health, and expanded on the fetal and neo-natal harms caused by premature birth. "Low birth weight [due to premature birth] is associated with almost half of all infant deaths and substantially increases the likelihood of birth defects," the Association informed the Senate. *Senate Hearings* at 466, 470. Some of the defects listed were "mental retardation, cerebral palsy, and other neurological disorders." *Id.* at 471. Others included "IQ deficiency and antisocial behavior." *Id.*

On the same day that Senator Hatch explored the OSHA problems with Dr. Hellegers, he explored several of the concerns that led him later to offer his narrowing amendments. For example, he asked a panel of government witnesses (from the EEOC, the Justice Department's Civil Rights Division, and the Labor Department) a series of questions about whether the bill should contain limitations on the "length of time" during which pregnant workers could receive disability insurance coverage—*e.g.*, of "3 weeks for pregnancy disability." *Senate Hearings* at 39-45.

Later that day, the Senator returned to his concerns about limiting the "length of time" for receipt of disability insurance benefits and about possible OSHA problems in a discussion with Clarence Mitchell, the Chairman of the Leadership Conference on Civil Rights. He explained to Mr. Mitchell that

> maybe there should be some limitations so people know where they stand and that does literally bother me. There are many problems that arise in this. It is a complicated area.
>
> If we grant this particular bill we may have OSHA problems that we hadn't thought of, and maybe we should. These are questions I legitimately have and want to have answers. But since the vast majority of insurers in America put a set time because of the overwhelming mass of statistical evidence showing that pregnancy is not really a disability but a natural occurrence in the overwhelming majority of cases that perhaps there might need to be a limitation rather than an unlimited generalized bill.

Senate Hearings at 109-10.

Significantly, during the floor debate, Senator Hatch did indeed offer an amendment to cap disability benefits at 6 weeks, and thereby attempted to limit the "length

of time" for which women workers who had had babies could receive disability benefits. He also proposed other amendments to cover other concerns he had raised from the first day of the Senate hearings.[5] Senator Hatch did not, however, propose an amendment to allow employers with occupational health concerns to treat fertile women differently than fertile men, by excluding the women from employment. He was apparently persuaded by Dr. Helleger's point that it is important to examine the effects of toxic agents on men as well as women, in order to protect male workers' children and not just those of female workers. He may also have been persuaded by Dr. Hellegers' eloquent statement about low income among pregnant women workers causing premature birth, with its attendant risks of learning disabilities and mental retardation. Whatever his motivation, however, the significant fact remains that he was clearly informed about the occupational health issue the Chamber of Commerce so prominently raised, and knew which clause of the PDA the Chamber was concerned about. Yet he chose not even to suggest amending the PDA to accommodate the Chamber's concern, despite his role as the leading proponent of narrowing amendments to the PDA.

In sum, despite the Chamber of Commerce's clear warning that the second clause of the PDA "would prevent

[5] His proposed amendments included: 1) the six-week limitation on pregnancy disability benefits discussed *supra* (Amendment No. 830) (rejected), Senate Comm. on Labor and Human Resources, *Legislative History of the Pregnancy Discrimination Act of 1978*, 96th Cong., 2d Sess. 56, 96-111, 122-24 (Comm. Print 1979) [hereinafter cited as *Leg. Hist.*]; 2) an amendment to clarify that a requirement of covering pregnancy in insurance plans did not apply to pre-existing conditions (Amendment No. 831) (withdrawn), *id.* at 57, 82-84; and 3) an extension of the date of compliance (Amendment No. 832) (adpoted), *id.* at 58, 84-86. Senator Hatch also discussed the enactment of a special pregnancy bill instead of an amendment to the Civil Rights Act, although this suggestion never materialized into a proposed amendment. *See Senate Hearings* at 44.

an employer from refusing certain work to a pregnant employee where such work posed a threat to the health of either the mother-to-be or her unborn child," and despite the fact that a highly visible Senator who offered other narrowing amendments publicly examined the Chamber's concerns, Congress left intact its requirement that "women affected by pregnancy, childbirth, or related medical conditions shall be treated the same for all employment-related purposes . . . as other persons not so affected but similar in their ability or inability to work." And in the entire legislative history of the PDA, no person or organization ever suggested to Congress that a different interpretation of this statutory language than the one offered by the Chamber applied to the occupational health problem. Nor did a single Member of Congress or a single Committee Report indicate any disagreement with the Chamber's interpretation.

Moreover, two important Senators were clearly influenced by Dr. Hellegers' approach of being concerned about the health of all children.[6] Senator Williams, the Chairman of the Senate Committee on Human Resources, had been present during Dr. Hellegers' Committee testimony and during Senator Hatch's questioning of Dr. Hellegers. When the Senator presented the bill to the full Senate in his role as floor manager, he pointedly focused on and used Dr. Hellegers' testimony at the very beginning of the PDA floor debate:

> Finally, Mr. President, I want to emphasize testimony received by the Committee from the American

[6] Indeed, fetal health had been the subject of concern in the Congressional session immediately preceding the one in which the PDA was introduced. The Toxic Substances Control Act, 15 U.S.C. §§ 2601, 2603 (1988), enacted on October 11, 1976 specifically addressed concerns for fetal safety by imposing strict reporting and testing requirements on industry in the production and use of teratogens and other toxins which present health and environmental hazards. Clearly such concerns were still fresh in the minds of the Members of Congress who began consideration of the PDA less than six months later.

Nurses' Association,[7] and from an eminent obstetrician, *Dr. Andre Hellegers*, which *documented the concrete connection between loss of income* during the disability phase of pregnancy *and a deterioration of the health* of the pregnant woman and *of her child* which results from impaired access to a healthful life situation.

In addition, there is a relation ship between infant prematurity and income. It is estimated that prematurity costs the Nation $1 billion per year for care and hospital nursing alone, not to mention *the cost of certain lasting effects which can result from prematurity.*

These problems can affect an enormous number of our Nation's children. *Approximately 40 percent of all pregnant women work* and, as we know, a large number of them are heads of households, or have unemployed or low-income husbands. . . .

> . . . We *must also consider the cost which is imposed on society when working women* and their families *are denied adequate income* for a decent standard of living. *This cost is felt in terms of medical complications for* both the women and *their children.* . . .

Leg. Hist. at 65, 66 (emphasis added). Senator Williams' remarks were soon followed by those of another influential member of the Committee reporting out the bill, Senator Kennedy. Senator Kennedy told the Senate:

> *Since women work to support their families, depriving them of such coverage* at a time they and their families are very much in need of it *discriminates* not only against these women but *against their families* as well. *This discrimination handicaps children* who are born into families where a paycheck—possibly the only paycheck—has arbitrarily vanished.

Senate Floor Debate, *Leg. Hist.* at 70 (emphasis added). Surely these remarks reflect the Senators' agreement with Dr. Hellegers' position that anyone with true concern for fetal harm would not bar pregnant women from working and would be sure to look at the impact of toxic chemicals

[7] *See* n.4, *supra.*

on the male reproductive system. Instead, such persons would make sure that employment environments would be safe for the children of both the male and female workers who might be exposed to toxic substances, by reducing the toxic substances to safe levels or taking other appropriate measures.

B. Congress Made Clear That the PDA's Prohibition on Pregnancy-Based Discrimination Had the Broadest Possible Application to All Pregnancy-Related Policies, Rendering Them *Per Se* Violations of Section 703(a) of Title VII.

The Johnson Controls' fetal protection policy, adopted in 1982, prevents all women who are "capable of bearing children" from working in "jobs involving lead exposure or which could expose them to lead through the exercise of job bidding, bumping, transfer or promotion rights." *International Union, UAW v. Johnson Controls*, 886 F.2d 871, 877 (7th Cir. 1989). The only women who are exempted are those who can prove, with medical documentation, that they are infertile. *Id.* at 876 n.8. Thus, all pregnant women and all women who might ever become pregnant are excluded from work in this group of jobs. Conversely, no men are excluded from these jobs. Even fertile men are permitted to work in a job in which they might be exposed to lead.

In defining the term "sex" as it appears in Title VII to include "pregnancy, childbirth, or related medical conditions," 42 U.S.C. § 2000e(k) (1982), Congress chose the broadest possible definition of pregnancy-related discrimination. The definition does not stop with pregnancy and childbirth, but is expanded to include any "related medical conditions." Since the ability to become pregnant and bear children is surely a "medical condition" which is "related" to pregnancy and childbirth, the PDA explicitly prohibits the Johnson Controls' ban on all women who are either pregnant or who might become pregnant.[8]

[8] The expansiveness of the definition is further demonstrated by the second clause, which extends its reach to all "women *affected*

The legislative history of the PDA overwhelmingly confirms that view. The witnesses who testified before the relevant Committees, the Committee Reports, and the floor debate all reflected a single, unanimous, perspective. First, the source of pregnancy discrimination was employers' attitudes about women's *capacity* for childbearing and their *potential* pregnancies, and these attitudes led to discrimination against both pregnant women and women who might become pregnant. Second, the PDA should ban all such discrimination.

This perspective was developed from the very first day of hearings and the opening panel of witnesses. The lead panel included the Co-Chair of the Campaign to End Discrimination Against Pregnant Workers (a broad-based coalition of women's rights organizations, civil rights groups, labor unions, and other public interest groups working to enact the PDA) and a law professor who worked closely with the Campaign. Professor Wendy W. Williams' statement started by describing the history of protective labor laws and their relationship to attitudes about pregnancy. As the prime example, she quoted from this Court's holding in *Muller v. Oregon*, 208 U.S. 412, 421 (1908), justifying restrictive labor laws for women only on the early "fetal-protection" theory that since "healthy mothers are essential to vigorous offspring, the physical well-being of woman becomes an object of public interest and care in order to preserve the strength and vigor of the race."[9] She then recounted the history of employers' policies towards pregnancy and summarized that history in the following terms:

---

by . . . related medical conditions," 42 U.S.C. § 2000e(k) (1982) (emphasis added), as the House Report agreed. *See* text at n.10, *infra*.

[9] *House Hearings* at 6 (statement of Wendy Williams); *Senate Hearings* at 124 (same). This quote should be read in light of the Court's position that women were properly placed in a class by themselves because of their "physical structure" and "performance of maternal functions." *Muller v. Oregon*, 208 U.S. at 420.

> [T]he common thread of justification running through most policies and practices that have discriminated against all women in the labor force rested ultimately on *the capacity of women to become pregnant* and the roles and behavior patterns of women that were assumed to surround that fact of pregnancy.
>
> . . . .
>
> . . . Moreover, *even women who don't actually become pregnant are, until they pass childbearing age, viewed by employers as potentially pregnant* and all women are subject to the effects of the stereotypes that women are marginal workers with all the multifaceted consequences this has for hiring, job assignment, promotion, pay, and fringe benefits.

House Hearings at 11-13, 43 (statement and testimony of Wendy Williams) (emphasis added). The Campaign's Co-Chair made a similar point:

> The Campaign supports H.R. 5055 because it will restore Title VII as an effective tool in eradicating sex discrimination in employment. It will reinstate what we believe Congress always intended—that all sex discrimination be eliminated, root and branch, from the market place, *especially including discrimination focussed on that one condition which makes women different from men—their childbearing capacity.*

House Hearings at 32, 47 (statement and testimony of Susan Deller Ross) (emphasis added). Both women made the same points before the Senate. *Senate Hearings* at 113, 118, 129-31, 151.

Other witnesses repeated this theme. The Vice-Chair and Acting Chair of the EEOC explained:

> There can be no question that the wide range of employment policies directed at pregnant women—*or at all women because they might become pregnant*—constitutes one of the most significant hindrances to women's equal participation in the labor market.
>
> . . .
>
> . . . .

> Policies which disadvantage women when they become pregnant—*or even because they might become pregnant*—endanger the limited financial security they now have.

House Hearings at 122-23 (testimony of Ethel Bent Welsh) (emphasis added); *Senate Hearings* at 32.

Drew Days, the Assistant Attorney General in charge of the Justice Department's Civil Rights Division, testified that "loss of income and employment opportunities, and limitations on reinstatement rights all operate to make women, whether pregnant, *potentially pregnant*, or formerly pregnant, second-class citizens in the employment sphere." *Senate Hearings* at 56 (statement) (emphasis added); *House Hearings* at 135. Laurence Gold, Special Counsel for the AFL-CIO, noted that "the overall affect [sic] of the special disadvantages imposed on pregnant women, *and women workers because they might become pregnant*, is to relegate *women in general*, and pregnant women particularly, to a second-class status with regard to career advancement and continuity of employment and wages." *Senate Hearings* at 209 (statement) (emphasis added); *House Hearings* at 65. Ms. Ruth Weyand, also a Co-Chair of the Campaign, explained that "employers rely on pregnancy to justify all forms of discrimination against women . . . *Unfair treatment because of potential pregnancy*, actual pregnancy, or recent pregnancy touches [women workers] at every point, and they feel very, very deeply the need to say that discrimination because of pregnancy is discrimination because of sex. *Senate Hearings* at 300-01 (testimony) (emphasis added). Senator Clark stated that he was cosponsoring S. 995

> because it is clear to me that discriminating against working women *on the narrow basis of their capacity to become pregnant* is not consistent with the goals set forth in the Civil Rights Act. . . . The significance of this legislation is that it deals with one of the most important causes of employment discrimination against women; namely, the age-old belief that a

> woman's primary role is to give birth and to care for the children.

Senate Hearings at 393-95 (testimony) (emphasis added).

Faced with this overwhelming consensus that the Act must eradicate practices based on women workers' capacity to become pregnant, both the Senate and House Committee Reports made absolutely clear that the Act would have this effect. The Senate Report first described this Court's decision in *General Electric Co. v. Gilbert*, 429 U.S. 125 (1976), and then stated:

> In the committee's view, the following passages from the two dissenting opinions in the case correctly express both the principle and the meaning of title VII. As Mr. Justice Brennan stated: "Surely it offends commonsense to suggest . . . that *a classification revolving around pregnancy is not, at the minimum, strongly 'sex related'*." Likewise, Mr. Justice Stevens stated that, "(b)y definition, such a rule discriminates on account of sex; *for it is the capacity to become pregnant which primarily differentiates the female from the male*."
>
> Thus, S. 995 was introduced to change the definition of sex discrimination in title VII to reflect the "commonsense" view and to insure that working women are protected against all forms of employment discrimination based on sex.

S. Rep. No. 95-331, 95th Cong., 1st Sess. 2-3 (1978) [hereinafter cited as S. Rep.], *Leg. Hist.* at 39-40 (emphasis added). The House Report agreed that "the dissenting Justices correctly interpreted the Act," and expressly quoted Justice Stevens' point about the "capacity to become pregnant." H.R. Rep. No. 95-948, 95th Cong., 2nd Sess. 2 (1978) [hereinafter cited as H.R. Rep.], *Leg. Hist.* at 148. It went on to specify that "in using the broad phrase 'women affected by pregnancy, childbirth, and related medical conditions,' the bill makes clear that its protection extends to the whole range of matters concerning the childbearing process." [10] *Id.* at 151. And it expressly referred to the historical patterns:

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[10] *See* n.8, *supra*.

> [T]he consequences of other discriminatory employment policies on pregnant women and women in general has historically had a persistent and harmful effect upon their careers. Women are still subject to the stereotype that all women are marginal workers. *Until a woman passes the child-bearing age, she is viewed by employers as potentially pregnant.* Therefore, the elimination of discrimination based on pregnancy in these employment practices in addition to disability and medical benefits will go a long way toward providing equal employment opportunities for women. . . .

H.R. Rep. at 6-7, *Leg. Hist.* at 152-53 (emphasis added).

Both Senator Williams and Representative Hawkins, the chairmen respectively of the Senate Committee on Human Resources and the House Subcommittee on Employment Opportunities, repeated these points in their presentations to the full Congress. Senator Williams pointed out that:

> *Because of their capacity to become pregnant,* women have been viewed as marginal workers. . . .
>
> The reported title VII cases reveal a broad array of discriminatory practices based upon erroneous assumptions about pregnancy and the effect it has on the capacity of women to work.
>
> In some of these cases, *the employer refused to consider women for particular types of jobs on the grounds that they might become pregnant,* even though the evidence revealed that pregnant women are perfectly capable of performing the work in question.
>
> . . . .
>
> [T]he overall effect of discrimination against women *because they might become pregnant,* or do become pregnant, *is to relegate women in general,* and pregnant women in particular, to a second-class status with regard to career advancement and continuity of employment and wages.
>
> These practices reach *all working women of childbearing age.*

Senate Floor Debate, *Leg. Hist.* at 61-62 (emphasis added). Representative Hawkins spoke in a similar vein in presenting the bill to the House of Representatives: "many of the disadvantages imposed on women are predicated upon *their capacity to become pregnant.*" House Floor Debate, *Leg. Hist.* at 168 (emphasis added). And in the moments before final passage of the legislation, when a compromise had been reached on the abortion issue,[11] even the concluding speaker addressed these same concerns, in words that speak directly to the Johnson Controls' policy:

> The legal status of the past often forced women to choose between having children and working. For many, wanting children could not outweigh the economic realities that her income was essential. This legislation gives her the right to choose both, to be financially and legally protected *before,* during, and after her pregnancy.

Leg. Hist. at 208 (comments of Rep. Sarasin) (emphasis added).

In the face of this overwhelmingly consistent legislative history, there simply can be no doubt that Congress intended to proscribe broadly-defined employer policies such as that used by Johnson Controls. In refusing to employ any woman who is pregnant or who might become pregnant, the company has engaged in a *per se* violation of Section 703(a) of Title VII, 42 U.S.C. § 2000e-2(a) (1982), as amended by the PDA's definition that sex includes "pregnancy, childbirth, or related medical conditions." 42 U.S.C. § 2000e(k) (1982). The Seventh Circuit clearly erred in refusing even to discuss or acknowledge this language and history.

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[11] *See* Section III *infra* for a discussion of the abortion issue.

II. BECAUSE THE PDA'S SECOND CLAUSE AND ITS LEGISLATIVE HISTORY MADE CLEAR THAT THE PREGNANT WOMAN'S OWN JOB PERFORMANCE ABILITIES, AND NOT FETAL HEALTH CONCERNS, ARE THE ONLY RELEVANT CRITERIA FOR ESTABLISHING A BFOQ, JOHNSON CONTROLS HAS NO BFOQ DEFENSE TO ITS FACIAL VIOLATION OF SECTION 703(a).

Without discussing any of the relevant statutory language or legislative history of the PDA, the Seventh Circuit erroneously held that the PDA allowed it to take account of fetal risks in determining whether Johnson Controls had a Section 703(e) BFOQ defense to its policy of banning all fertile women from employment. Its sole PDA discussion was as follows:

> In the context of the Pregnancy Discrimination Act, application of the bona fide occupational qualification defense requires a court to consider the special concerns which pregnancy poses. A proposed BFOQ relating to capacity for pregnancy (or actual pregnancy) will exclude fewer employees than a BFOQ excluding all women. *The court must also consider the physical changes caused by pregnancy, i.e., the presence of the unborn child, in determining whether the employee's continuance in a particular employment assignment will endanger the health of her unborn child.*

Johnson Controls, 886 F.2d at 893-94 (footnote omitted) (emphasis added). This conclusion is flatly contradicted by the PDA and its legislative history.

The BFOQ exception of Section 703(e) of Title VII, 42 U.S.C. § 2000e-2(e) (1982), must be read in light of the second clause of the PDA. Just as the first clause of the PDA (defining "sex" to include "pregnancy, childbirth, or related medical conditions") applies throughout Title VII wherever the term "sex" is found, so too does the second clause. Thus, it applies equally to the BFOQ section, and indeed gives content to the application of the BFOQ in the pregnancy context.

The second clause provides that "women affected by pregnancy, childbirth, or related medical conditions shall be treated the same for *all* employment-related purposes . . . as other persons not so affected but similar in their ability or inability to work." 42 U.S.C. § 2000e(k) (1982) (emphasis added). It was precisely this clause that the Chamber of Commerce identified as preventing "an employer from refusing certain work to a pregnant employee where such work posed a threat to the health of . . . her unborn child." *House Hearings* at 84; *Senate Hearings* at 482.

The legislative history reveals that the Chamber's assessment was correct, because of the clear meaning of the term "ability or inability to work." At the beginning of both Committee hearings, the Co-Chair of the Campaign to End Discrimination Against Pregnant Workers explained this core concept of the legislation:

> [The bill] defines the appropriate standard for eliminating . . . discrimination [based on pregnancy, childbirth, and related medical conditions], by providing that pregnant workers who are able to work shall be treated the same as other able workers, and that pregnant workers who are unable to work shall be treated the same as other disabled workers.
>
> . . . .
>
> The point here is that no conclusions about a woman's *medical ability to work* can be drawn from the fact of pregnancy *per se*. *Most women are able to work through most of their pregnancies* (although less than 5% do suffer some complications that prevent them from working). *Those pregnant women who are able to work should be allowed to work like all other able workers.* Conversely, all pregnant women have some period of *medical disability*, beginning in a normal pregnancy with *labor itself and continuing through the normal recuperation period of 3 to 8 weeks after childbirth.*

Senate Hearings at 151-52, 153 (statement of Susan Deller Ross) (emphasis added); *House Hearings* at 32-33, 34. Clearly, the focus of the suggested standard was

on the effect of the woman's pregnancy on her ability to perform job duties, and the standard contemplated that any woman who was physically able to perform her job duties should be allowed to do so. The references to "medical ability to work" and the examples of medical inability to work—including labor itself, the 3 to 8 weeks recuperation period after childbirth, and complicating medical conditions of pregnancy affecting less than 5 percent of all pregnant women—particularly clarify that the ability to work concept refers to the woman's individual ability to perform her job duties.

Different employer stereotypes could affect employers' decisions to forbid pregnant women to work despite their ability to do so. Professor Williams discussed a variety of such stereotypes in her testimony, and specifically included that of "fetal protection," in describing a Children's Bureau study from the early 1940's which examined "the practice of firing women when they become pregnant." *House Hearings* at 9; *Senate Hearings* at 127. The study noted that "the reason often given for the practice was the protection of the mother and fetus." *Id.*

The theme of equal treatment based on comparable ability to work—that is, job performance ability—was reiterated in the Committee Reports and the floor debate. Thus, the Senate Report stated:

> By defining sex discrimination to include discrimination against pregnant women, the bill rejects the view that employers may treat pregnancy and its incidents as *sui generis*, without regard to its functional comparability to other conditions. Under this bill, the treatment of pregnant women in covered employment must focus not on their condition alone but on the actual effects of that condition on their ability to work. *Pregnant women who are able to work must be permitted to work on the same condition as other employees; and when they are not able to work for medical reasons*, they must be accorded the same rights, leave privileges and other benefits, as other workers who are disabled from working.

S. Rep. at 4, *Leg. Hist.* at 41 (emphasis added). In explaining when disability benefits would have to be paid, the Report clarified that they would be paid "only on the same terms applicable to other employees—that is, generally, only when the employee *is medically unable to work.*" *Id.* (emphasis added). Examples of times when workers would *not* have to be paid disability benefits because they were not medically disabled included a pregnant woman who "wishes, *for reasons of her own*, to stay home to prepare for childbirth, or, after the child is born to care for the child." *Id.* (emphasis added). And while disability benefits would normally be paid for "4-8 weeks" after childbirth, since that is "the period of disability for a normal pregnancy," on the other hand, "if there are medical complications of pregnancy or childbirth which prevent a woman from working for more than the normal period, the entire disability period . . . would have to be covered." S. Rep. at 4, *Leg. Hist.* at 41-42.

Similarly, in discussing employers' leave policies, the Report pointed out, in language that could apply directly to the Johnson Controls' policy, that "employers will no longer be permitted to force women who become pregnant to stop working *regardless of their ability to continue*; . . . and they will not be able to refuse to hire or promote women simply because they are pregnant." S. Rep. at 6, *Leg. Hist.* at 43 (emphasis added).

The House Report contained virtually identical discussions. *See* H.R. Rep. at 4-5, *Leg. Hist.* at 150-51. And like the Senate Report, the House Report specifically rejected "mandatory leave for pregnant women *arbitrarily established at a certain time during their pregnancy and not based on their inability to work.*" H.R. Rep. at 6, *Leg. Hist.* at 152 (emphasis added).

While the Committee Reports alone would be decisive on the point that it is solely the pregnant woman's job performance abilities that count in determining employer rights to force her into unemployment, the statements of the two floor managers during the floor debates reempha-

size the unified approach of the Reports. Thus, Representative Hawkins stated:

> [E]mployers . . . must treat pregnant women as they treat other employees similar in their ability or inability to work. This means, for example, that *if an employer permits other employees to continue working unless their doctors regard them as physically unable to work, it may not force pregnant women off the job, as many employers have done in the past, while they are perfectly able to perform their jobs.*

Leg. Hist. at 24-25 (emphasis added). Senator Williams explained: "[t]he central purpose of this bill is to require that women workers be treated equally with other employees on the basis of their ability or inability to work." Senate Floor Debate, *Leg. Hist.* at 62-63.

These statements make clear that, far from allowing courts to consider fetal health concerns which have no impact on the woman's job performance abilities, Congress mandated equal treatment based solely on the pregnant employee's ability to work in comparison to other employees not so affected but similar in their ability to work. In requiring this equality of treatment, Congress intended to prohibit employers from considering anything other than the employee's actual ability to perform the job—concerns about the health of fetuses or potential fetuses are simply not relevant. That was a point that the Chamber of Commerce understood on a first reading of the second clause of the PDA, but which the Seventh Circuit entirely ignored. Accordingly, it erred in ruling that Johnson Controls had established a BFOQ based solely on fetal health concerns; as a matter of law, these concerns cannot justify a BFOQ.

Finally, while Johnson Controls has sought to justify its policy with scientific data, not even the scientific evidence supports a fetal protection policy that excludes only fertile women. As shown below, the Johnson Controls' policy is scientifically irrational.

III. TO PROVIDE FETAL PROTECTION CONSISTENT WITH TITLE VII, JOHNSON CONTROLS MUST ADOPT A SEX-NEUTRAL POLICY THAT APPLIES EQUALLY TO ITS MALE AND FEMALE WORKERS; SUCH A POLICY WILL ALLOW THE EMPLOYER BOTH TO COMPLY WITH TITLE VII AND TO MAKE THE WORKPLACE SAFE FOR THE CHILDREN OF BOTH MALE AND FEMALE EMPLOYEES.

Even though the current Johnson Controls' policy is invalid under Title VII, Johnson Controls has several options if it genuinely seeks to adopt policies consistent with Title VII which also protect the fetus. First, it can study the hazards caused by the exposure of fertile workers of either sex to lead, and adopt a policy which applies equally to all male and female workers. In developing its current policy, the company has focussed only on the exposure to lead of fertile women, and not of fertile men. It discounted, or ignored, studies showing the potential impact of lead on the male reproductive system and the concrete ways in which male exposure could affect fetal development. As the UAW's and other amicus briefs show, the scientific evidence simply does not support a fetal protection policy that applies only to fertile women, and not to fertile men, and that does not consider the harms caused by loss of income.

In 1978, less than a month after enactment of the PDA, the Occupational Safety and Health Administration found:

> There is conclusive evidence of miscarriage and stillbirth in women who were exposed to lead *or whose husbands were exposed.* Children born of *parents either of whom* were exposed to lead are more likely to have birth defects, mental retardation, behavioral disorders or die during the first year of childhood.
>
> . . . .
>
> A. Lead has profoundly adverse effects on the reproductive ability of male and female workers in the lead industry.

B. Lead exerts its effects prior to conception through genetic damage (germ cell alteration), effects on menstrual, and ovarian cycles and decreased fertility in women, decreased libido and decreased fertility in men through altered spermatogenesis.

. . . .

The record in this rulemaking is clear that male workers may be adversely affected by lead as well as women. Male workers may be rendered infertile or impotent, and both men and women are subject to genetic damage which may affect both the course and outcome of pregnancy. Given the data in this record, OSHA believes there is no basis whatsoever for the claim that women of childbearing age should be excluded from the workplace in order to protect the fetus or the course of pregnancy. . . . There is no evidentiary basis, nor is there anything in this final standard, which would form the basis for not hiring workers of either sex in the lead industry.

OSHA, Final Standard for Occupational Exposure to Lead, 43 Fed. Reg. 52,951, 52,954, 52,960, 52,966 (1978) (emphasis added). Professor Williams has explained some of the other ways in which the exposure of male workers to lead can affect their children:

> [T]he pregnant woman, and as a consequence, her fetus, can be exposed through a male worker to toxic substances found in the workplace. One well documented way in which such exposure occurs is by male transportation of hazardous substances from work to home on his clothes, shoes, or hair.[12] Another route, theoretically likely but as yet unconfirmed, is exposure of the pregnant woman and fetus through

[12] The footnote for this statement cited "A. Hricko, [*Working For Your Life: A Woman's Guide To Job Health Hazards*] C-8, C-9 [(1976)] (children exposed to lead carried home on parent's clothing . . .); [and] Stellman, [*The Effects of Toxic Agents on Reproduction*, Occ. Health and Safety 36,] 42 [(Apr. 1979)] (exposure to lead carried home on worker's clothing)." *See also* Ashford, *New Scientific Evidence and Public Health Imperatives*, 316 N. Engl. J. Med. 1084-85 (1987) (not only is the male reproductive system at risk but men may carry home lead-contaminated clothing or objects and expose wives and children).

> vaginal absorption of toxic substances carried in the seminal fluid of the exposed male worker.[13]

Williams, *Firing the Woman to Protect the Fetus: Reconciliation of Fetal Protection with Employment Opportunity Goals under Title VII*, 69 Geo. L.J. 641, 657 (1981). These routes of transmission would help explain the studies linking "lead exposure in male lead workers with a *high death rate among offspring in the first year of life*." *Johnson Controls*, 218 Cal. App. 3d at ——, 267 Cal. Rptr. at 168.

Adopting a policy that applies only to women is scientifically irrational if the children of males exposed to lead can also be harmed. Stereotype, not science, best explains why Johnson Controls developed such a policy, for many employers believe that there is an "exclusive connection" between the mother and birth defects, notwithstanding scientific studies and common sense about the male role in reproduction.[14] Moreover, one author has noted that "fertile women will be excluded only from higher-paying, traditionally male jobs and not from lower-paying, traditionally female jobs, even if fetal risks are the same."[15] The author also discussed the pesticide DBCP; when it was linked to infertility and sterility in men, it was banned by the EPA. That suggests a second stereo-

[13] The footnote for this assertion stated:

> J. Manson & R. Simon, *Influence of Environmental Agents on Male Reproductive Failure*, WORK AND HEALTH OF WOMEN 171 (V. Hunt ed. 1979). The authors state: ". . . [D]rugs transmitted via the semen during coitus are likely to enter the systemic circulation of the female. This may constitute a significant route of exposure for the female as well as the embryo." *Id.* at 332-33. *See also* J. Bell & J. Thomas, *Effects of Lead on Mammalian Reproduction in* LEAD TOXICITY 169, 174 (Singhal & Thomas, eds. 1980 ("[T]here may be a passage of lead from the male via the semen which could influence the conceptus directly").

[14] Williams, 69 Geo. L.J. at 660.

[15] Becker, *From Muller v. Oregon to Fetal Vulnerability Policies*, 53 U. Chi. L. Rev. 1219, 1257 (1986).

type: male workers must be accommodated because their income is vital to their families, but female workers need not be, because they are merely secondary workers seeking pin money whose income will not be missed. Stereotypical policies that apply only to women under the cover of pseudo-science indicate an attempt to discriminate against women, not an attempt to genuinely help the children of those workers. To insure genuine protection for all children, Johnson Controls' best option is to make the workplace safe for all workers, by adopting a policy that applies equally to men and women. Only that option accords with Senator Williams' statement during the floor debates on the PDA that "[n]o special restrictions applicable to pregnancy or childbirth alone will be permitted under this legislation." Senate Floor Debate, *Leg. Hist.* at 103.

It is possible, of course, that Johnson Controls' policy was motivated not by fetal health concerns but by cost considerations. The record below includes no evidence as to the cost of lowering workplace exposure to lead; there is merely a conclusory statement that no company has been able to make batteries without using lead. Cost, however, is not an excuse for discrimination. *See Arizona Governing Committee v. Norris*, 463 U.S. 1073, 1085 n.14 (1983); *Los Angeles Dept. of Water & Power v. Manhart*, 435 U.S. 702, 716-17 (1978). In fact, the PDA was enacted despite projections that its cost would range from $130 million to $2.5 billion. S. Rep. at 11, *Leg. Hist.* at 48; Senate Floor Debate, *Leg. Hist.* at 98. As Senator Javits stated: "[a]s in all legislation designed to correct social injustices, this bill will entail some costs to employers and to the public . . . . [T]he costs entailed are quite insignificant in light of the principle that underlies this bill." Senate Floor Debate, *Leg. Hist.* at 68.

As yet another justification for its fetal protection policy, Johnson Controls claimed at the Seventh Circuit oral argument "that it is morally required to protect children from their parents' mistakes." *Johnson Controls*,

886 F.2d at 912 (Easterbrook, J., dissenting). However, the legislative history of the PDA shows that Congress intended to prohibit employers from using a morality rationale as justification for a policy of refusing to hire and promote female employees whose morality offended them. The Congressional intent to prevent employers from justifying hiring, firing, and no-promotion policies based on their aversion to the woman's moral decisions can be seen from how Congress handled the issue of abortion.

When the Senate first considered the abortion issue, it rejected an amendment by Senator Eagleton, which would have added the following sentence to the first section: "As used in this subsection, neither 'pregnancy' nor 'related medical conditions' may be construed to include abortions except where the life of the mother would be endangered if the fetus were carried to term." Senate Floor Debate, *Leg. Hist.* at 112. Those opposing the amendment emphasized, in urging its defeat, that it would allow employers to impose their moral beliefs on their employees. As Senator Javits explained, the Eagleton amendment

> leaves the employer in a position where, if any employee determines to have an abortion, that employer can take any adverse discriminatory action. He can refuse to hire, he can fire, he can demote, he can deny promotion, he can cut pay. In effect, therefore, *the conscience of the employer would be foisted upon the employee*, and I cannot conceive of our acquiescing in any such result.
>
> . . . .
>
> . . . [The amendment] would superimpose the right of the employer over the constitutionally protected individual conscience of the employee.

Senate Floor Debate, *Leg. Hist.* at 118-19 (emphasis added). The Senate then tabled the amendment. *Id.* at 120. It thus made very clear that an employer could not "foist" its moral beliefs on an employee through a policy of firing or refusing to hire women who had had abortions.

While the House bill did contain an abortion exception, it applied only to fringe benefits, not to hiring and firing policies. *Leg. Hist.* at 145. The Conference Committee narrowed the House's language even further, to an exception for health insurance benefits alone. House Conference Report, *Leg. Hist.* at 194. This left intact the original PDA provision barring employers from firing or from refusing to hire or promote women who had had abortions. Senator Javits explained: "since the abortion proviso specifically addresses only health insurance, the proviso in no way affects an employee's right to sick pay or disability benefits or, indeed, the freedom from discrimination based on abortion in hiring, firing, seniority, or any condition of employment other than medical insurance itself." Senate Floor Debate, *Leg. Hist.* at 203. Thus, under the PDA as enacted, employers may not refuse to hire or promote women who have had abortions. The policy of refusing to hire or promote women who are pregnant, or who may become so, out of a claimed moral concern for the health of their fetuses, fares no better. In neither case does the employer have a right to foist its conscience on the woman.

CONCLUSION

In conclusion, this Court should not disturb the policy decisions that Congress made in enacting the PDA—policies that are so clearly spelled out in the comprehensive legislative history that the Seventh Circuit simply ignored. Thus, for the reasons stated above, this Court should reverse the decision of the Seventh Circuit, grant summary judgment to the UAW, and rule that the Johnson Controls' policy of banning all fertile women from employment in the alleged interest of fetal health is a facial violation of Title VII, as amended by the PDA, that cannot be justified by a BFOQ.

Respectfully submitted,

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APPENDIX

APPENDIX

INTEREST OF AMICI CURIAE

This brief amici curiae is submitted on behalf of Equal Rights Advocates, NOW Legal Defense and Education Fund, the National Women's Law Center, and the Women's Legal Defense Fund. These organizations were leaders in the Campaign to End Discrimination Against Pregnant Workers, the coalition which was the principal proponent of the Pregnancy Discrimination Act, and/or have represented women with claims of pregnancy-based discrimination. Amici believe that the decision below has the potential for causing great harm to enforcement of the PDA. This brief amici curiae is filed in support of the Petitioners in this case.

Equal Rights Advocates, Inc. (ERA) is a San Francisco based public interest law firm dedicated to securing legal and economic equality for women through litigation, advocacy and public education. A major portion of ERA's work over the last sixteen years has been dedicated to the elimination of sex discrimination in the workplace. ERA was a member of the Campaign to End Discrimination Against Pregnant Workers, a broad-based coalition that worked to enact the PDA. ERA believes that employment discrimination based on pregnancy and a woman's reproductive capacity adversely affects large numbers of women workers and their right to equal employment opportunities.

The NOW Legal Defense and Education Fund (NOW LDEF) is a non-profit civil rights organization that performs a broad range of legal and educational services nationally in support of women's efforts to eliminate sex-based discrimination and secure equal rights. NOW LDEF was founded in 1970 by leaders of the National Organization for Women, a membership organization of over 250,000 women and men in more than 750 chapters throughout the country. A major goal of NOW LDEF is the elimination of barriers that deny women economic

opportunities. Discrimination against women based upon reproductive capacity, as a major barrier to women's full and equal employment, is a central concern to NOW LDEF.

The National Women's Law Center is a non-profit organization founded in 1972 as the Women's Rights Project of the Center for Law and Social Policy, and it became an independent organization in 1981. The Center first became actively involved in the issue of pregnancy discrimination in 1973, through its representation of amici curiae in support of the plaintiffs at the trial level in *General Electric Co. v. Gilbert*, 429 U.S. 125 (1976). The Center continued its participation in this landmark case in the Court of Appeals and Supreme Court. Further, once *Gilbert* was decided, the Center became active first in developing and then participating in the Campaign to End Discrimination Against Pregnant Workers. In this capacity, the Center closely monitored the progress of the Pregnancy Discrimination Act, and provided technical assistance in support of its passage. Since that time, the Center has participated in numerous cases addressing problems of pregnancy discrimination, counseled victims of such discrimination, and served as a legal resource to combat pregnancy discrimination in many forums.

The Women's Legal Defense Fund (WLDF) is a non-profit, membership organization founded in 1971 to advance women's equality. WLDF combats gender-based discrimination in employment through litigation of significant cases, the operation of a counseling program, and agency advocacy before the EEOC and other agencies charged with enforcement of the equal opportunity laws. WLDF has had a particular interest in the issue of pregnancy-based employment discrimination because of its theoretical and practical centrality to equal employment opportunity for women. Thus, after this Court's decision in *General Electric Co. v. Gilbert*, *supra*, WLDF played a leading role in the coalition formed to enact the

Pregnancy Discrimination Act. After the PDA's enactment, WLDF advocated issuance of strong guidelines interpreting the PDA by the Equal Employment Opportunity Commission, and instituted a Pregnancy Rights Monitoring Project to educate the public about their rights under the PDA and to monitor government agencies' enforcement of that Act; WLDF continues this role to the present day. In 1979, WLDF began to advocate that the EEOC issue guidelines on the application of Title VII, as amended by the PDA, concerning employers' exclusion of fertile women based on alleged occupational reproductive health hazards, and founded a Coalition on the Reproductive Rights of Workers to promote public policy that ensures workplaces safe for all workers, including pregnant women. Again, WLDF has continued to comment on and monitor the development of EEOC policy regarding reproductive health hazards. WLDF has also participated as amicus in the two cases that have come before this Court on the proper interpretation of the PDA: *Newport News Shipbuilding & Dry Dock Co. v. EEOC*, 462 U.S. 669 (1983), and *California Federal Savings & Loan Assoc. v. Guerra*, 479 U.S. 272 (1987). Finally, WLDF has led the efforts to secure passage of the federal Family and Medical Leave Act in Congress and of similar laws in the states.

The American Civil Liberties Union, which was also a major participant in the Campaign to End Discrimination Against Pregnant Workers, fully endorses this amici curiae brief, but is submitting a separate brief on behalf of itself and other amici.